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11 LOS VALLES LAND & GOLF, LLC

12 UNITED STATES BANKRUPTCY COURT
13 DISTRICT OF NEVADA
14

15 In re:
16 USA COMMERCIAL MORTGAGE
COMPANY,
17 Debtors.
18

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20 USACM LIQUIDATING TRUST,
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Plaintiff,
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v.
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24 LOS VALLES LAND & GOLF, LLC, a
Delaware Limited Liability Company,

25 Defendant.
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Case No. BK-S-06-10725-LBR
Jointly Administered
Chapter 11

Adversary No.: 08-01058-LBR

[The Honorable Linda B. Riegler]

**DEFENDANT LOS VALLES LAND &
GOLF, LLC'S OBJECTION TO USACM
LIQUIDATING TRUST'S MOTION TO
CONSOLIDATE**

Date: April 17, 2008
Time: 10:30 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through this motion, the USACM Trust ("USACM") seeks to improperly circumvent the Court's Order and the parties' stipulated agreement, that USACM be required to bring a motion in order to amend its claims to join another party.

Los Valles filed a Proof of Claim in this bankruptcy proceeding arising out of a dispute between itself and USACM. In December 2007, USACM filed a motion to amend its objection to Los Valles' Proof of Claim in order to include a counterclaim against Los Valles' for payment of certain monies, and against Dan Palmer, an individual that USACM claims guaranteed Los Valles' alleged obligations. The parties agreed and stipulated that USACM would be allowed to amend its objection to include the counterclaim against Los Valles, but would withdraw its motion as it pertained to Mr. Palmer. As to Mr. Palmer, the parties agreed that USACM could only join Mr. Palmer if it again brought a motion for leave to amend. On January 29, 2008, the Court entered an Order consistent with the parties' stipulation.

On February 25, 2008, USACM filed an adversary complaint against Los Valles alone, consistent with the Court's Order and the parties' stipulation. Just days later, however, on March 13, 2008, USACM amended its adversary complaint to join Mr. Palmer, and the next day filed this motion to consolidate the adversary action including Mr. Palmer with the objection to Los Valles' Proof of Claim.

Los Valles would not object to the consolidation of USACM's objection to Los Valles' Proof of Claim with the originally filed adversary complaint against Los Valles itself. Indeed, that is exactly what the parties intended through their stipulation. USACM should not, however, be allowed to use the consolidation procedure as a means to circumvent the Court's Order and the parties' agreement concerning the joinder of Dan Palmer. Nor should USACM be allowed to interject side issues concerning Mr. Palmer into the dispute between USACM and Los Valles.

Los Valles, therefore, respectfully requests that the Court deny USACM's improper motion for consolidation.

1 **II. BACKGROUND**

2 In November 2006, Los Valles filed Proof of Claim No. 10725-01366, seeking contract and tort
3 damages arising out of a loan brokered by USACM. On September 20, 2007, USACM filed an
4 objection to Los Valles Proof of Claim.

5 On December 21, 2007, USACM moved to amend its claim objection to include a counterclaim
6 against Los Valles, to allege a purported breach of contract in failing to pay certain monies, and against
7 Dan Palmer, who purportedly guaranteed such payment. Prior to a hearing on the matter, the parties
8 agreed and stipulated that the Court grant USACM's motion as it pertained to USACM's counterclaim
9 against Los Valles and that USACM would withdraw its motion as it pertained to Dan Palmer. Any
10 further amendment to join Mr. Palmer, the parties agreed, would require USACM to file a new motion
11 for leave to amend. The parties also requested that the Court set a trial on the claim objection for July
12 2008.

13 On January 29, 2008, the Court entered an Order approving the stipulation, and providing, in
14 part, that the motion for leave to amend as it pertains to Mr. Palmer is withdrawn without prejudice,
15 and allowing USACM to file a new motion for leave to amend if it wished to join Mr. Palmer at a later
16 date.

17 On February 25, 2008, USACM filed an adversary complaint against Los Valles, consistent
18 with the Court's order and the parties' agreement. On March 13, 2008, however, before Los Valles had
19 an opportunity to answer, USACM filed an amended adversary complaint in which it joined Dan
20 Palmer. USACM did not file any motion for leave to amend its adversary complaint. The very next
21 day, March 14, 2008, USACM filed the instant motion to consolidate its objection to Los Valles' Proof
22 of Claim with the adversary proceeding.

23 **III. ARGUMENT**

24 USACM's motion should be denied because it is an impermissible attempt to circumvent this
25 Court's Order, and the parties agreement, requiring USACM to seek leave join Dan Palmer.

26 While USACM seeks relief through its motion only under Federal Rules of Bankruptcy
27 Procedure, Rules 3007 and 7001, a request for consolidation is actually governed by Bankruptcy Rule
28 7042. *See* Fed. R. Bankr. Proc. 3007, Advisory Committee Notes, 2007 Amendments ("If a claim

1 objection is filed separately from a related adversary proceeding, the court may consolidate the
 2 objection with the adversary proceeding under Rule 7042.”). Bankruptcy Rule 7042 simply provides
 3 that Federal Rules of Civil Procedure, Rule 42, applies in adversary proceedings. Fed. R. Bankr. Proc.
 4 7042.

5 Rule 42 provides that, “[i]f actions before the court involve common question of law or fact,
 6 the court *may* . . . consolidate the actions.” Fed. R. Civ. Proc. 42 (emphasis added). Under Rule 42, a
 7 court has broad discretion to determine whether consolidation is appropriate given the circumstances
 8 of the instant case. *See Investors Research Co. v. United States District Court for the Central District*
 9 *of California*, 877 F.2d 777, 777 (9th Cir. 1989). Courts have consistently found, however, that a court
 10 should not allow a party to use consolidation as a means of avoiding other procedural rules, such as
 11 rules governing the time and means for amending pleadings. *See In re Prodentia Securities Inc. Ltd.*
 12 *Partnership Litigation*, 158 F.R.D. 562, 570 (S.D.N.Y. 1994) (noting that in determining whether to
 13 consolidate actions, a court must ensure that the party seeking to use the procedure is not doing so “for
 14 the purpose of circumventing the rules pertaining to the amendment of complaints”); *Walton v.*
 15 *Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) (finding that consolidation is inappropriate when the
 16 moving party seeks to use it as a means “to expand the procedural rights that he would have otherwise
 17 enjoyed,” such as “circumventing the rules pertaining to amendment of complaints”); *Alpine Bank*
 18 *v. Hubbell*, 2007 WL 219948, at *4 (D. Colo. 2007) (despite recognizing that judicial economy
 19 weighed in favor of consolidation, refusing to consolidate actions because the point of the request was
 20 to circumvent another procedural requirement).

21 Here, USACM seeks to circumvent this Court’s Order, and the parties’ agreement, that
 22 USACM is required to seek leave to join Dan Palmer. Before Los Valles even had the opportunity to
 23 answer USACM’s pleading, USACM amended the complaint to join Mr. Palmer and brought the
 24 instant motion to consolidate. The Court should not, in its discretion, reward USACM’s attempted end
 25 run around the requirement that it bring a motion in order to join Mr. Palmer in the parties’
 26 proceedings.

27 Moreover, USACM has not made any evidentiary showing that consolidation would be
 28 beneficial to either the parties or this Court. The parties agreed to and requested a quick resolution of


1 Los Valles claim and USACM's counterclaim (now adversary complaint) by July 2008. Now,
2 however, USACM seeks to add an extraneous issue, Mr. Palmer's potential liability on a guarantee.
3 Such unnecessary litigation would only delay the effort to resolve the pertinent issues between Los
4 Valles and USACM – the issues that both parties agreed would alone be litigated unless USACM
5 sought relief from this Court to include Mr. Palmer.

6 **IV. CONCLUSION**

7 USACM's actions evidence an apparent attempt to use the consolidation procedure as a means
8 to circumvent this Court's Order, and the parties' stipulated agreement, that USACM must file a
9 motion for leave to amend if it wishes to join Mr. Palmer in the parties' litigation. The Court should
10 therefore exercise its discretion to deny USACM's improper motion.

11 Dated: April 1, 2008

AKIN GUMP STRAUSS HAUER & FELD LLP

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13 By 
14 Bruce Jacobs
15 Attorneys for Defendant
16 LOS VALLES LAND & GOLF, LLC
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